

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

SHELBY NASH-HUNTER, )  
)  
Petitioner, )  
)  
v. ) Docket No. 28031-12.  
)  
COMMISSIONER OF INTERNAL REVENUE, )  
)  
Respondent )

**ORDER & ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

Pending before the Court is respondent's Motion to Dismiss for Lack of Jurisdiction, as supplemented. Respondent moves the Court to dismiss this case for lack of jurisdiction on the ground that the petition was not filed within the time prescribed by sections 6213(a) or 7502, I.R.C. By Order dated January 24, 2013, the Court directed respondent to supplement his motion to dismiss, setting forth and discussing fully respondent's position as to whether a letter dated October 22, 2012, if treated by the Court as a petition for taxable years 2006, and 2007, was filed timely as to the notice of deficiency for 2006 and 2007, upon which the case is based.

On January 28, 2013, petitioner filed a Response to Respondent's Motion to Dismiss for Lack of Jurisdiction requesting the Court to allow her petition. On February 14, 2013, respondent supplemented his Motion to Dismiss for Lack of Jurisdiction to address the Court's directive. As a result thereof, the Court then directed the parties to each file a response setting forth and discussing more fully both questions related to (a) the FedEx First Overnight delivery service, and (b) that party's position as to whether FedEx First Overnight is a designated private delivery service under Notice 2004-83, 2004-4 C.B. 1030. See also sec. 301.7502-1(e)(2)(ii), Proced. & Admin. Regs. On March 19, 2013, respondent filed a Response thereto. On April 23, 2013, petitioner filed a Motion to Withdraw Objection to Respondent's Motion to Dismiss for Lack of Jurisdiction.

Background

The notice of deficiency dated July 23, 2012, upon which this case is based was sent to petitioner's last known address, by certified mail on July 23, 2012. The notice of deficiency reflected that the last day to file a petition with the Court was October 22, 2012, which 90-day period for timely filing a petition with this Court from the notice of deficiency expired on October 22, 2012, which date was not a Saturday, a Sunday, or a legal holiday in the District of Columbia. Petitioner sent a letter dated October 22, 2012, which was sent in a FedEx First Overnight envelope which the Court received on October 23, 2012. The FedEx website indicated through the tracking number that the Ship (pick-up) date was "Mon 10/22/2012" and Docket No. 28031-12

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the actual delivery was “Tue 10/23/2012”. October 23, 2012 is 91 days after the notice of deficiency was mailed and issued.

### Discussion

A petition is not timely filed if received by the Court after a 90-day period to petition a notice of deficiency unless the petition is mailed on or before the 90-day period by U.S. mail or by a private delivery service (PDS) designated as a “designated delivery service”. See secs. 6213(a) and 7502(f); Notice 2004-83, 2000-4 C.B. 1030. By virtue of section 7502, a petition that is timely mailed is deemed to be timely filed.

Petitioner did not use the U.S. Postal Service to send her petition to the Court. Nevertheless, sending a petition by a designated PDS may also be treated as timely mailing. See sec. 7502(f)(1). In Notice 2004-83, 2004-2 C.B. 1030, an updated list of companies and classes of delivery service that constitute “designated delivery service” for purposes of section 7502 was established by the Commissioner. Notice 2004-83 expressly states that FedEx is not designated with respect to any type of delivery service not expressly identified in its listing. See Scaggs v. Commissioner, T.C. Memo. 2012-258; Austin v. Commissioner, T.C. Memo. 2007-11.

The timely mailing/timely filing rule of section 7502 applies not only if the taxpayer sends a petition through the U.S. mail but also if the taxpayer sends the petition using a private delivery service designated by the Commissioner. Insofar as FedEx is concerned FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Priority, and FedEx International First are among the delivery services explicitly listed in Notice 2004-83. FedEx Overnight is not explicitly listed in Notice 2004-83 as a “designated delivery service”. Thus, the timely mailing/timely filing rule of section 7502 does not apply to FedEx First Overnight. See Rackowski v. Commissioner, T.C. Memo. 2007-72; Austin v. Commissioner, *supra*; Notice 2004-83, *supra*.

Even if petitioner’s letter were deemed an imperfect petition, such imperfect petition was not timely filed because it was received by the Court on October 23, 2012, after the 90-day period for timely filing and was not timely mailed because petitioner did not mail her petition by U.S. mail or by a designated delivery service within the 90-day period after the issuance of the notice of deficiency.

In view of the foregoing, we hold that the petition in this case was not timely filed pursuant to section 6213(a) or section 7502. Accordingly, we shall grant petitioner’s motion to withdraw the objection to respondent’s motion to dismiss for lack of jurisdiction and we shall grant respondent’s Motion to Dismiss for Lack of Jurisdiction, as supplemented, and dismiss this case for lack of jurisdiction on the ground that the petition was not timely filed.

Given due consideration to the foregoing, it is hereby

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ORDERED that petitioner's Motion to Withdraw Objection to Respondent's Motion to Dismiss for Lack of Jurisdiction, filed April 23, 2013, is granted and petitioner's Objection to Respondent's Motion to Dismiss for Lack of Jurisdiction, as supplemented, filed March 20, 2013, is hereby withdrawn and set aside. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction, as supplemented is granted and this case is dismissed for lack of jurisdiction.

**(Signed) Joseph Robert Goeke**  
**Judge**

**ENTERED: JUN 21 2013**